SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 312

WORTHINGTON AMES AND GERTRUDE AMES,
HUSBAND AND WIFE,

Petitioners,

vs.

EMPIRE STAR MINES COMPANY, LTD.,

Respondent.

JURISDICTIONAL STATEMENT.

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1. The law believed to sustain the jurisdiction of the petition herewith presented is Section 237 (b) Judicial Code (28 U. S. C. A. Sec. 344), the pertinent provisions applicable to said petition reading:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of the state in which a decision could be had * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States; and the

power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

2. The judgment sought to be reviewed by the petition herein was rendered by the Supreme Court of the State of California January 31, 1941 (17 A. C. 228), and a rehearing denied by said Supreme Court February 27, 1941, and the time for the filing of the petition herein was extended by order of this Court to the 26th day of July, 1941.

3. The decision sought to be reviewed involves a question of extralateral rights asserted by respondent in an ore vein apexing in respondent's claims, which lie outside of petitioners' land, and dipping under the surface of petitioners' land. Petitioners' land was granted to the California and Oregon Railway Company by the United States by act of Congress of July 25, 1866 (14 Stat. A. L. 239), and the grant to said land was confirmed by patent under date of June 14, 1880 (R. 208). Respondent's mining claims lie without the surface boundaries of petitioners' land. Their title is deraigned from the United States under acts of Congress, the first of such acts being the act of July 26, 1866 (14 Stat. A. L. 251). The rights of the parties depend upon the seniority of their respective titles. Each party claims senior title. Petitioners contend that their title is a common law fee with all surface and subsurface rights of such estate, which was granted to the railway company as of July 25, 1866; that respondent's title cannot be senior to this title because the first act of Congress authorizing the disposal of mineral lands as such is the act of July 26, 1866 (14 Stat. A. L. 251). The California Supreme Court held, in its decision herein sought to be reviewed, that title did not pass to the railway company until patent therefor was issued on June 14, 1880, saying (17 A. C. 234):

"In the present case there was no final and definite location of the Ames Tract by the railroad until the

> securing of the patent in 1880. Under the act of July 25, 1866, it had merely a 'floating grant' whereby it might secure title to the land on which it subsequently located."

This ruling is directly contrary to the ruling of this Court in many cases. See,

Wisconsin v. *Price*, 133 U. S. 496;
Deseret Salt Co. v. *Tarpey*, 142 U. S. 241.

Such ruling of the California Supreme Court is also contrary to those cases decided by this Court holding that a patent is a conclusive determination that the land so patented is not mineral land within the mineral exception contained in grants in aid of railroad construction.

Wisconsin v. *Price*, 133 U. S. 496;
Burke v. *Southern Pacific R. R. Co.*, 234 U. S. 669;
West v. *Standard Oil Co.*, 278 U. S. 200.

4. The decision of the California Supreme Court, if allowed to stand, is a decision contrary to the decisions of this Court without exception and will cast a cloud upon the title of all grants made to railroads in aid of their construction and will subject patents to such grants to collateral attack.

5. The grounds above set forth were raised before the California courts at every stage of the proceedings before said courts and were the basis upon which petitioners sought to enjoin respondent from mining under the surface of their land. Said grounds were raised in petitioners' pleadings before said California courts, in the introduction of the evidence at the trial of the case and were fully presented by briefs and arguments before all of said courts. The said courts ruled contrary to the position taken by petitioners with reference thereto, as above set forth.

6. The California Supreme Court held that title did not pass to the railroad company until it secured its patent on

June 14, 1880 (17 A. C. 228, 234), and then that title to the surface only of said lands passed; that title to the subsurface of said lands remained in the United States and that mining claims located on the public domain prior to and subsequent to such patent acquired extralateral rights in the land of petitioners.

7. The California Supreme Court held that a claim patented under the act of May 10, 1872 (17 Stat. A. L. 91) of more than 1500 feet in length had extralateral rights; that locations of mining claims on the public domain could be proved by evidence and that said locations were proved by evidence that was insufficient for such purpose.

Petitioners respectfully submit that this petition and the matters set forth therein are within the jurisdiction of this Court.

Dated San Francisco, California, July 26, 1941.

SIMEON E. SHEFFEY,
HERMAN WEINBERGER,
Attorneys for Petitioners.
RICHARD BELCHER,
Of Counsel for Petitioners.

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No. 312

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EMPIRE STAR MINES COMPANY, LTD.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of the above named petitioners respectfully shows to this Honorable Court:

I.

Summary and Short Statement of the Matter Involved in This Case.

The controversy between petitioners and respondent depends upon the seniority of their respective titles. Each claims a senior title. Petitioners are the owners of the

Southwest quarter (SW¼) of Section 15, Township 16, Range 5 East, M. D. B. and M., Yuba County, California. Petitioners' land will be hereinafter referred to as "The Ames Land." Respondent is in possession of and operating two certain mining claims known as the Pennsylvania Claim and the Jefferson Claim, situated in Section 16 of the township above stated. The lode, or vein, upon which said mining claims are located, has a north and south strike, with an easterly dip. This vein, on its dip, passes under the Ames land. Respondent, contrary to the consent of petitioners, is mining this vein under the surface boundaries of the Ames land.

Respondent's land is two mining claims, (1) the Pennsylvania, patented, and, (2) the Jefferson, held by location, both situated in the Southeast quarter (SE¼) of Section 16 of the above township. Both claims are the same width (approximately 400 feet), the side lines of the one being a continuation of the side lines of the other. The Pennsylvania claim is 1540 feet in length, and the Jefferson is about 520 feet. The claims are located on a vein striking north and south and dipping easterly. The side lines of the claims are approximately parallel with the line running north and south between sections 15 and 16. Section 16 is a school section. The mining claims and the Ames land are not contiguous, there being the strip of school land approximately 200 feet wide lying between the easterly side line of the mining claims and the westerly line of Section 15. A diagram of lands is attached hereto.

Title to the Ames Land.

Section 15, above described, was granted to the California and Oregon Railway Company by Congress July 25, 1866 (14 Stat. A. L. 239). The lands so granted were succeeded to by the Central Pacific Railway Company. The railroad was built from Roseville, California, north, and, as to 77.6

miles, the map showing the completed railroad was filed in the United States Land Office July 27, 1870 (R. 191). This portion of the road extended beyond the Ames land and was the portion by the construction of which the Ames land was earned. The section and township survey was filed in the United States Land Office August 6, 1867, and approved November 21, 1867 (R. 115).

On June 14, 1880, a patent was issued by the United States to the Central Pacific Railway Company for land including the portions of Section 15, wherein lies the Ames land (R. 208). By mesne conveyance, on April 15, 1914, petitioners acquired said Ames land (R. 212-213-214).

Title to Mining Claims.

Pennsylvania:

A patent to the Pennsylvania mining claim was issued August 18, 1880 (R. 254-257). The application for patent is dated January 22, 1880, and was filed May 31, 1880 (R. 218-221). Respondent contended that this claim was located under miners' rules and regulations prior to 1863, and that its title related back to such location.

Jefferson:

The Jefferson claim is unpatented and held by location. The earliest location to which respondent attaches its title in this claim is the F. W. Johnson location, dated June 4, 1891 (R. 260).

Both parties hereto agree that their respective rights depend upon seniority of title, but each claims senior title.

Respondent's mining activities under the surface of the Ames land were begun subsequent to May 6, 1935, under an agreement of this date, a copy of which is defendant's Exhibit C in the record (R. 262). Prior to re-

spondent's mining a great many years had elapsed since any mining had been done on either of respondent's claims. See testimony of respondent's witness F. W. Johnson (R. 121-122, 124, 125).

Petitioners' Contentions.

Petitioners contend that the date of the inception of their title in private ownership is July 25, 1866, the effective date of the granting act (14 Stat. A. L. 239). That the grant was *in praesenti.* That the grant conveyed a common law fee with all surface and subsurface rights of a common law fee; that when the patent was issued June 14, 1880, the grant of July 25, 1866, was confirmed and thereby it was determined conclusively that the Ames land was not mineral land and not within the mineral land exception of the granting act.

Respondent's Contentions.

Respondent contends that both of its claims were located under miners' rules and regulations prior to 1863; that under such miners' rules and regulations, and by virtue of such locations, extralateral rights were acquired; that by such locations the vein was carved out extralaterally throughout its dip from all overlying lands except the mining claims; that by such locations there was attached forever to said claims extralateral rights; that the grant by the United States to the railway company did not affect these rights, asserted under miners' rules and regulations.

Petitioners' Answer to Respondent's Contentions is This:

That under the Constitution of the United States, only Congress may grant rights in the public domain; that prior to the first act of Congress (July 26, 1866) (14 Stat. A. L. 251), providing for the disposal of mineral lands, miners

on the public domain were trespassers, and had no rights except as among themselves; that neither the title of the United States nor its grantee in the public domain was in any way affected by locations under miners' rules and regulations prior to July 26, 1866. That on July 25, 1866, the United States could and did grant to the railway company the Ames land; that the grant was the grant of a common law fee, confirmed by patent on June 14, 1880.

That title to the school land in Section 16, a portion of which lies between petitioners' land and respondent's, vested in the State of California before any rights were acquired in the mining claims and was also a common law fee.

That respondent failed to prove any locations prior to the Act of Congress of May 10, 1872 (17 Stat. A. L. 91).

Petitioners herein filed an action in the Superior Court of the State of California, in and for the County of Yuba, entitled "Worthington Ames and Gertrude Ames, husband and wife, plaintiffs, vs. Empire Star Mines Company, Ltd., First Doe, Second Doe and Third Doe, defendants." In said action plaintiffs therein were seeking to enjoin defendants from mining under the surface of their said land and also seeking to recover damage for mining theretofore done. The matter of respondent's right to mine under petitioners' land was tried before said Superior Court, which rendered a judgment therein against petitioners herein. The issue of damages was deferred by stipulation of the parties until the first issue was finally disposed of. A copy of said judgment is page 20 of the record. An appeal was duly taken from said judgment to the Supreme Court of the State of California, which court affirmed the judgment of the trial court; thereafter a petition for rehearing was made to said Supreme Court and was denied February 27, 1941.

II.

Reasons Relied On for the Issuance of the Writ.

The Supreme Court of California (17 A. C. 228) *has decided a Federal question of substance relating to the effect of a Federal grant of lands in the public domain in a way not in accord with the applicable decisions of this court, but as a matter of fact in direct conflict therewith, as follows:*

A.

A railway grant in terms "there is hereby granted", is a grant *in praesenti.* Petitioners' land was thus granted July 25, 1866 (14 Stat. A. L. 239) and confirmed by patent June 14, 1880. Such grant is a grant of a common law fee.

The decision of the California Supreme Court is contrary to the foregoing established principle. Note particularly the language of the court (17 A. C. 234):

> "In the present case there was no final and definite location of the Ames Tract by the railroad until the securing of the patent in 1880. Under the act of July 25, 1866, it had merely a 'floating grant' whereby it might secure title to land on which it subsequently located. When the Ames Tract was finally and definitely located in 1880 its subsurface not only was known to be mineral but was subject to the vested extralateral rights of the adjoining mines."

B.

Rights in the United States public domain can be granted only by Congress (U. S. Const. Art. IV, Sec. 3, Sub. 2). The first act of Congress authorizing the disposal of Mineral land was passed July 26, 1866 (14 Stat. A. L. 251). Congress, having granted to the railway company petitioners' land on July 25, 1866, it could not thereafter grant rights in the same land to someone else.

The decision of the California Supreme Court is contrary to the foregoing established principle. Note particularly the language of the court (17 A. C. 234):

"The subsurface of the Ames Tract being clearly mineral could not pass under the terms of the act but remained in the government, and the Pennsylvania and Jefferson mines received full extralateral rights to mine therein by virtue of the Mining Act of July 26, 1866."

C.

THE DECISION OF THE CALIFORNIA SUPREME COURT HOLDS:

1. That the grant here involved in aid of railway construction did not pass title until the patent was issued and that the patent, when issued, passed surface rights only;

2. That miners, under their rules and regulations prior to the first mining act of Congress of July 26, 1866, could acquire vested rights in the public domain which would defeat the effect of a grant by Congress;

3. That the first mining act of Congress automatically granted rights in public domain to miners thereon in their respective claims that took precedence over prior grants of Congress;

4. That in 1880 miners could acquire rights under the mining statutes of 1866, though the latter act was expressly repealed by the mining statute of 1872 (17 Stat. A. L. 91).

5. That hearsay evidence is admissible to prove location under miners' rules and regulations, contrary to the previous decisions of the said Supreme Court and of this court.

6. That locations under miners' rules and regulations were proved by evidence which was totally insufficient.

Thus, the California Supreme Court has rendered a decision on the effect of a Federal grant, the result of which, as stated by Mr. Justice Carter in his dissenting opinion (17 A. C. 241) *is as follows:*

"The conclusion reached in the majority opinion not only renders insecure and subject to collateral attack every railroad patent in this state, but it places the

same cloud upon every agricultural patent which has been issued within the last seventy-five years."

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of this Honorable Court, directed to the Supreme Court of the State of California, commanding said court to certify and send to this Court for its review and determination, at a date to be therein designated, a complete transcript of all of the proceedings in said Supreme Court of the State of California in said cause, entitled Worthington Ames and Gertrude Ames, husband and wife, plaintiffs and appellants, vs. Empire Star Mines Company, Ltd., First Doe, Second Doe and Third Doe, defendants and respondents, Sacramento No. 5246, in the records of said Supreme Court and that the judgment decree of said Supreme Court in said cause be reversed by this Honorable Court and that your petitioners have such other and further relief as to this Honorable Court may seem meet and the nature of the case require, and so your petitioners will ever pray.

Dated: San Francisco, California, July 26, 1941.

SIMEON E. SHEFFEY,
HERMAN WEINBERGER,
Attorneys for Petitioners.

RICHARD BELCHER,
Of Counsel for Petitioners.

Certificate of Counsel.

I hereby certify that I am one of the attorneys for the petitioners in the above entitled case, and that in my judgment the foregoing petition is well founded in law and fact, and that said petition is not interposed for delay.

Dated: San Francisco, California, July 12, 1941.

SIMEON E. SHEFFEY,
Attorney for Petitioners.

(Here follows Defendant's Exhibit A-1.)

MAP

PENNSYLVANIA-JEFFERSON DEVELOPMENTS

BROWNS VALLEY

CALIFORNIA

1907

PENNSYLVANIA

JEFFERSON

AMES TRACT

DEFENDANT'S EXHIBIT 11